

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DENNIS DOYLE RHODES,

Defendant-Appellant.

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UNPUBLISHED

August 7, 2003

No. 239691

Oakland Circuit Court

LC No. 01-178533-FC

Before: Zahra, P.J., and Talbot and Owens, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b. The trial court sentenced defendant to four concurrent terms of fifteen to thirty years' imprisonment. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant asserts that the trial court erred in scoring offense variable 13 at twenty-five points for a continuing pattern of criminal behavior, and that his counsel was ineffective in failing to challenge the scoring.

“A sentencing court has discretion in determining the number of points to be scored for a variable, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Scoring decisions for which there is any evidence in support will be upheld.” *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Offense variable 13 is scored twenty-five points if the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(b). For determining the appropriate points under the variable, “all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). Conduct that is scored under offense variables 11 or 12 is not to be scored under offense variable 13. MCL 777.43(2)(c).

The trial court's scoring of OV 13 was based on conduct that was not considered in OV 11. The presentence report indicated that defendant had repeatedly molested complainant for a long period of time prior to the offenses for which defendant was charged and convicted. The trial court could properly rely on information in the presentence report in scoring the guidelines.

*Elliott, supra* at 262-263. Accordingly, we reject defendant's contention of error. Moreover, it is well established that trial counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel because trial counsel failed to call several potential character witnesses. Ordinarily, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Here, the record suggests that, despite alleging that defendant performed criminal acts, the prosecutor's witnesses refrained from offering testimony implying that defendant character was questionable. In fact, the victim's mother provided some testimony that was complimentary of defendant's character. Accordingly, we reject defendant's contention that it was unsound trial strategy to conclude that enhancing defendant's character was unnecessary. *Id.* Further, calling witnesses to testify about defendant's character would have opened the door for the prosecutor cross-examine these character witnesses regarding specific instances of conduct, MRE 404(a)(1); MRE 405(a). Consequently, we are not persuaded that there is merit to defendant's challenge to the effectiveness of trial counsel. *Snider, supra* at 425.

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot  
/s/ Donald S. Owens